UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEPHANIE BERRY, Plaintiff	
v.	Civil No. 99-283-P-C
WILLIAM HENDERSON, United States Postmaster General, Defendant	

Gene Carter, District Judge

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Stephanie Berry filed this action against Defendant United States Postal Service alleging Title VII sexual harassment (Count I), Title VII retaliation (Count II), Americans with Disabilities Act ("ADA") retaliation (Count III), and Rehabilitation Act retaliation (Count IV). Plaintiff alleges that from the time she began work in the maintenance department of the Postal Service, she was retaliated against and exposed to a sexually hostile work environment. The instant action is preceded by Berry's eight separate EEO claims against the Postal Service alleging gender discrimination and/or retaliation by the Postal Service. In addition to filing complaints on behalf of herself, Berry, acting as maintenance Craft Director for the American Postal Workers Union ("APWU") at the Postal Service, filed numerous discrimination complaints on behalf of other Postal Service employees. Now before the Court is Defendant's Motion for Summary Judgment.

I. FACTS

Stephanie Berry was an employee of the Postal Service between December 1986 and June 1996. Plaintiff's Statement of Additional Facts (hereafter "PSAF") ¶ 1 (Docket No. 24). When first employed by the Postal Service, she was a clerk; she then became a letter carrier; and, in April 1991, she transferred to the maintenance department of the Postal Service at Portland. Defendant's Statement of Undisputed Facts (hereafter "DSUF") ¶ 1 (Docket No. 14); Plaintiff's Statement of Undisputed Facts ("PSUF") ¶ 1 (Docket No. 24). In May of 1994, Berry became the union craft director for the APWU. At that time, she was the only female craft director. DSUF ¶ 14; PSUF ¶ 14.

During 1991 and 1992, Phil Hefty served as the maintenance manager at the Portland facility, and Berry's direct supervisors in the maintenance department included Messrs. Swift, Mullen, Paluca, and Hilton. DSUF ¶¶ 1b, 2; PSUF ¶¶ 1, 2. From 1991-1993, Alexander Lazaroff served as postmaster and plant manager in Portland. DSUF ¶ 1a; PSUF ¶ 1. In January 1993, after a national Postal Service reorganization effort, Daniel Ryan was hired as the new maintenance manager for the Portland facility. DSUF ¶ 9; PSUF ¶ 9. From 1994 to 1996, Robert Olbrias was employed as the supervisor of maintenance operations for Tour III at the Portland Postal Service facility. DSUF ¶ 15; PSUF ¶ 15. In September 1994, Joe Leonti became the plant manager in Portland. DSUF ¶ 17; PSUF ¶ 17.

While in the maintenance department, Berry filed eight separate EEO complaints, with each complaint encompassing a number of allegations. Berry's claims are detailed in EEO cases 1141-92, 1212-92, 1213-92, 1214-92, 1268-92, 1194-93, 1014-95, and 1012-96.[1] DSUF ¶¶ 23-

[1] Except for Berry's affidavit filed in 1012-96 and the final agency decision in EEO case 1014-95, the summary judgment record does not include copies of Plaintiff's EEO complaints. *See* Berry EEO Affidavit; Scheele Declaration Ex. C. The Court relies, therefore, on the parties' generic characterization of the claims in the other EEO cases.

62; PSUF ¶¶ 23-62. EEO case 1012-96 forms the underlying claim to this lawsuit. Berry EEO Aff. ¶ 2.

EEO Case 1141-92

In March 1992, Berry initiated EEO case 1141-92, claiming gender discrimination on the following grounds: management delay of the completion of her performance eligibility register ("PER") for approximately one year, from April 11, 1991, to April 14, 1992; management's decision not to award her higher-level details during the time her PER was delayed; temporary maintenance supervisor Swift's refusal to allow women on the softball team in the summer of 1991; and the statement by a co-worker to Berry that he had heard from another co-worker of Postmaster Lazaroff's desire to have her fired. DSUF ¶¶ 23-24; PSUF ¶¶ 23-24. On October 16, 1992, the Postal Service issued a final agency decision regarding these claims, rejecting the allegations on the grounds that they were untimely, that Berry did not suffer any harm, and/or that she was no longer aggrieved. DSUF ¶ 25; PSUF ¶ 25. On November 13, 1992, Berry appealed the final agency decision to the Equal Employment Opportunity Commission ("EEOC"). DSUF ¶ 26; PSUF ¶ 26. On February 23, 1993, the EEOC upheld the agency's dismissal of EEO case 1141-92 with the exception of ordering the agency to reinstate Plaintiff's allegation of having been passed for higher-level details. DSUF ¶ 27; PSUF ¶ 27. In June 1993, Plaintiff withdrew the allegations in EEO case 1141-92 without pursuing them to federal court within 90 days.[2] DSUF ¶¶ 28-29; PSUF ¶¶ 28-29.

[2] Defendant asserts that Berry failed to pursue the claims "to federal court within 120 days." The Court understands the operative timeframe to be 90 days whether it involves a "final action" or the EEOC's "final decision on an appeal." 29 U.S.C. §§ 1614.408(a) and (c) (1992).

EEO Cases 1212-92, 1213-92, 1214-92, and 1268-92

On July 6, 1992, Berry initiated EEO cases 1212-92, 1213-92, 1214-92, and 1268-92. DSUF ¶ 30; PSUF ¶ 30. In EEO case 1212-92, Berry alleged retaliation by maintenance supervisor Ernie Paluca and group leader Hilton when she was denied a higher-level detail on November 30, 1992. DSUF ¶ 31; PSUF ¶ 31. In EEO case 1213-92, Berry alleged that Hefty retaliated against her on June 23, 1992, by changing the days off with respect to a job that she alleged she was about to be awarded. DSUF ¶ 32; PSUF ¶ 32. In EEO case 1214-92, Berry alleged discrimination in the form of supervisor Mullen's harassment of her on June 24, 1992. DSUF ¶ 33; PSUF ¶ 33. On September 9, 1992, Berry initiated EEO case 1268-92 alleging retaliation by Hefty's denial of her request for Saturday and Sunday as her scheduled days off.[3] DSUF ¶¶ 34-35; PSUF ¶¶ 34-35.

In November 1992, the Postal Service issued its final agency decision regarding 1212-92, 1213-92, 1214-92, and 1268-92, rejecting all of the allegations as untimely and for failure to state a claim. DSUF ¶ 36; PSUF ¶ 36. In December 1992, Berry filed a consolidated appeal to the EEOC regarding all of these cases. DSUF ¶ 37; PSUF ¶ 37. In May 1993, the EEOC upheld the Postal Service's final agency decision regarding all of these cases on the ground that they were untimely. DSUF ¶ 38; PSUF ¶ 38. In June 1993, Berry requested reconsideration regarding the four cases. DSUF ¶ 39; PSUF ¶ 39. In October 1993, the EEOC denied reconsideration of those cases. DSUF ¶ 40; PSUF ¶ 40. Berry did not pursue the claims from all of these cases to federal court within 90 days of the denial of reconsideration. DSUF ¶ 41; PSUF ¶ 41.

[3] Defendant's Statement of Undisputed Facts identifies "September 9, 1993," as the date of Hefty's denial of Berry's request for days off. DSUF ¶ 35. Plaintiff does not challenge the accuracy of the dates. PSUF ¶ 35. The Court assumes, however, that the event giving rise to the EEO complaint did not occur after that complaint was filed and, thus, concludes that the error is typographical.

EEO Case 1194-93

On December 1, 1992, Berry initiated EEO case 1194-93, alleging that it was retaliation when she received a rating for training, background, and experience at a level lower than she believed she deserved. In this case, Berry alleges that this rating resulted in a low placement on a PER and her subsequent nonselection for a position as tool and parts clerk. DSUF ¶ 42; PSUF ¶ 42. This case was consolidated with the complaint of another maintenance department employee, Roy L'Italien, who was also complaining about his failure to be selected for the Tool and Parts position. DSUF ¶ 43; PSUF ¶ 43. In September 1994, Administrative Law Judge Cuevas ruled that the Postal Service did not discriminate against Berry or L'Italien.[4] DSUF ¶¶ 44-45; PSUF ¶¶ 44-45. Berry appealed the decision of Judge Cuevas, and the appeal was denied in April 1996. DSUF ¶ 46; PSUF ¶ 46. Berry requested reconsideration of the denial of her appeal, and that, too, was denied in February 1998. DSUF ¶¶ 47-48; PSUF ¶¶ 47-48. Berry did not pursue the allegations in EEO case 1194-93 to federal court within 90 days of the denial of reconsideration. DSUF ¶ 49; PSUF ¶ 49.

EEO Case 1014-95

On December 27, 1994, Berry initiated EEO case 1014-95, in which she alleged gender discrimination and retaliation on the following grounds: management's requirement that she attend BBC training; the denial of her request to update her qualifications with respect to the tool and parts clerk position; supervisor Giagnorio's harassment of her in the presence of her co-workers; harassment regarding her union activity; and the denial of overtime opportunities. DSUF ¶ 50; PSUF ¶ 50. On April 12, 1995, Berry filed a formal complaint with respect to case 1014-95.

[4] Defendant's Statement of Undisputed Facts states, "Judge Cuevas ruled that the Postal Service did not discriminate against Berry or *Cuevas*." DSUF ¶ 45. The Court assumes that Defendant intended to state that Judge Cuevas found no discrimination against Berry or *L'Italien*.

DSUF ¶ 51; PSUF ¶ 51. On April 5, 1996, Berry requested a hearing with respect to this case. DSUF ¶ 55; PSUF ¶ 55. Later, Berry withdrew her request for a hearing and, instead, requested a final agency decision. DSUF ¶ 56; PSUF ¶ 56. In August 1997, the Postal Service issued a final agency decision with respect to EEO case 1014-95, finding no discrimination. DSUF ¶ 57; PSUF ¶ 57. On December 9, 1997, Berry and the Postal Service finalized a settlement agreement to resolve all issues in EEO case 1014-95.[5] DSUF ¶ 58; PSUF ¶ 58.

EEO Case 1012-96

On June 14, 1996, Berry requested EEO counseling in a case that would later be identified as EEO case 1012-96. DSUF ¶ 20, 59; PSUF ¶ 20, 59. In this case, Berry asserts gender discrimination in the form of a sexually hostile work environment and retaliation for her EEO activity. The specific allegations in Berry's EEO Affidavit include: Leonti's physical threat to her at a meeting on May 16, 1996, Berry EEO Aff. ¶ 21; Berry Dep. at 173-74; Ryan's retaliation against her on May 14, 1996, by ordering Joseph Manganaro to write her up as absent without leave ("AWOL"), Berry EEO Aff. ¶ 20, Berry Dep. at 81-82, Manganaro Aff. ¶¶ 7-9; Ryan's statements to her that "he could make things much better for [her] at the Postal Service if only [she] would submit to his requests" and that "he would negotiate with [her] if [she] gave him something he wanted," his requests of "asking [her] out on his boat [and to go have] beers with him," and his statement that "he could make [her] feel better," Berry EEO Aff. at ¶ 4; Ryan's "derogatory comments such as, 'You bitches always want things done your way,'" Berry EEO Aff. ¶ 4; Ryan's stories to her about his "female conquests with other women," Berry EEO Aff. ¶ 4; the permeation of her work environment with sexual comments, sexually abusive statements, sex-

[5] The settlement agreement provided, in part, that Berry "agrees that no future action based on the facts, issues and circumstances giving rise to the above-captioned case, shall be brought before any court or administrative tribunal, except for enforcement purposes." DSUF ¶ 58(f); PSUF ¶ 58.

related jokes, and sexually explicit cartoons, Berry EEO Aff. ¶¶ 3, 5; Berry Dep. at 122, 276-78, Ex. 21; repeatedly being called "a bitch and a cunt," Berry EEO Aff. ¶ 3; male employees' use of the bathroom while Berry was cleaning it and the presence of sexually explicit graffiti throughout the men's bathroom, Berry EEO Aff. ¶ 8; the towing of her car, Berry EEO Aff. ¶ 20; the refusal of management to accept Berry's 991 form for promotion to the position of tool and parts clerk, Berry Aff. ¶ 16; the denial of her request for an update for the tool and parts clerk position, Berry EEO Aff. ¶ 16; Hefty's comments to the effect that those employees who made EEO complaints would not be promoted, Berry EEO Aff. ¶ 18; Robert Swift's false statements to Berry's co-workers that she was filing sexual harassment charges against them, Berry EEO Aff. ¶ 9; the refusal of Marc Scheele, an EEO counselor, to accept Berry's presentation of handwritten notes detailing incidents which she felt were discriminatory or harassing, Berry EEO Aff. ¶ 10; Hefty's false statements to co-workers portraying Berry as having a sexual relationship with co-worker Chuck Simmons, Berry EEO Aff. ¶ 10; the change from Saturday/Sunday days off to Tuesday/Wednesday days off when Berry received her scores and was entitled to a promotion in 1992, Berry EEO Aff. ¶ 12; Hefty's failure to correct the problem with her test scores, which resulted in Berry being denied her PER for one year, from April 11, 1991, to April 14, 1992, Berry EEO Aff. ¶ 9; denial to Berry the award of higher-level details during the time her PER was delayed, Berry EEO Aff. ¶ 9; the statements of two co-workers to Berry that Postmaster Lazaroff wanted her fired, Berry EEO Aff. ¶ 10; Ryan's continuous threats to make her job miserable by breaching the collective bargaining agreement if she filed EEO complaints and his follow-through with those threats, Berry EEO Aff. ¶ 20; and the denial of promotions at the Postal Service, Berry EEO Aff. ¶¶ 6, 12.

Sometime in June of 1996, Berry stopped working at the Postal Service and applied for disability retirement, which application was later accepted by the Office of Personnel

Management. DSUF ¶¶ 19, 21, 22; PSUF ¶¶ 19, 21, 22. On September 20, 1996, she filed the formal complaint in EEO case 1012-96. That complaint forms the basis of this action. DSUF ¶¶ 60-61; PSUF ¶¶ 60-61.

II. DISCUSSION

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc*., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Haye*s, 116 F.3d 957, 959 (1st Cir. 1997).

A. Statute of Limitations

Title VII requires a federal employee plaintiff to file his or her claim in a timely manner. Although a number of limitation periods apply, the first is that a federal employee must contact an EEO counselor within forty-five days of the alleged discriminatory event. 29 C.F.R. § 1614.105(a)(1). Failure to do so bars a civil action based on the alleged conduct. *Roman-Martinez v. Runyon*, 100 F.3d 213, 219 (1st Cir. 1996). Defendant argues that many of Plaintiff's claims took place more than forty-five days before she sought counseling with the EEO in case

1012-96, and, therefore, are untimely and not actionable. Plaintiff counters this argument by asserting that the claims are timely under the theory of a continuing violation.[6]

Before addressing Plaintiff's claim of a continuing violation, the Court finds that two of the discriminatory incidents alleged clearly occurred within the forty-five-day limitation period set by 29 C.F.R. § 1614.105(a)(1). In this case, Plaintiff contacted an EEO Counselor on June 14, 1996. DSUF ¶ 59; PSUF ¶ 59. Thus, she must show that a discriminatory act occurred within forty-five days prior to June 14, 1996 – on or after April 30, 1996. Plaintiff alleges two discriminatory incidents that clearly fall within the forty-five-day window. The first incident occurred on May 16, 1996, when Berry met with "Mr. Leonti to address Mr. Ryan's discriminatory conduct towards [her], as well as other issues which were escalating the hostility of the craft," and "Mr. Leonti blamed [Plaintiff] for the problems and lunged over the table at [Plaintiff], and "physically threatened [Plaintiff]." Berry EEO Aff. ¶ 21; DSUF ¶ 264; PSUF ¶ 264; Berry Dep. at 173-74. Leonti denies threatening Berry, but does not deny that the meeting took place on May 16, 1996. DSUF ¶ 268.

The other incident occurred on May 14, 1996, when Manganaro wrote up Berry as being absent without leave ("AWOL"). DSUF ¶ 119; PSUF ¶ 119. Plaintiff asserts that Ryan retaliated against her by ordering Manganaro to write her up as being AWOL. Berry Dep. at 81-82; Affidavit of John Riley ¶ 6[7]. Manganaro states that Plaintiff was written up because of her absence

[6] Specifically, Plaintiff argues that under the continuing violation doctrine, the fact of prior incidents is relevant to the claims she asserts in the instant action. Plaintiff's argument indicates an apparent confusion about the purpose of asserting a continuing violation. The demonstration of a continuing violation allows a Title VII plaintiff to extend a statutory limitation period by linking acts that fall outside the statute of limitation to those that fall within the limitation period. In essence, the continuing violation theory determines what claims are actionable, not the evidentiary question of relevance. Despite Plaintiff's apparent confusion, the Court understands Plaintiff to assert a continuing violation and will analyze the allegations accordingly.

[7] Defendant asserts that the Court should not consider the Riley Affidavit because it is unclear whether the statements in the affidavit are made on his personal knowledge or based upon information and belief. The statement at issue with respect to the AWOL incident appears to be made on Riley's personal knowledge. If Riley's statement is shown to be made without personal knowledge, the Court will rule on its admissibility at that time.

from work without prior written permission to be away from work that day. Manganaro Aff. ¶¶ 7-9. Plaintiff responds that she had been verbally authorized to attend an arbitration that day. Berry Dep. at 81; Riley Aff. ¶ 6. Manganaro asserts that if Plaintiff's leave had been preapproved, he would have recorded it as leave without pay ("LWOP") rather than as AWOL. Manganaro Aff. ¶ 14. Although the parties dispute whether the two incidents were discriminatory, both parties agree that the events happened within the limitations period.

1. Continuing Violation

An equitable exception to the limitation period is established if Plaintiff can demonstrate a "continuing violation." *Provencher v. CVS Pharmacy*, 145 F.3d 5, 14 (1st Cir. 1998). Continuing violations take two forms: serial and systemic. Plaintiff here asserts both types. Under the theory of serial violation, the Court must determine if Plaintiff has raised a genuine issue of material fact over whether Defendant participated in a serial, continuing violation of her rights. In order to successfully do so, Plaintiff must demonstrate: (1) the existence of at least one independently actionable sexual harassment claim within the limitations period; and (2) that there is a substantial relationship between the timely claim and the series of acts antedating the limitations period. *See Sabree v. United Brotherhood of Carpenters and Jointers*, 921 F.2d 396, 400, 402 (1st Cir. 1990). A systemic violation refers to general practices or policies which are discriminatory. Under this theory, Plaintiff need not identify a discrete act of discrimination occurring within the limitations period. As long as the policy or practice itself continues into the limitation period, that complaint is timely. *Jensen v. Frank*, 912 F.2d 517, 523 (1st Cir. 1990). The Court will discuss the two types of continuing violation in turn.

a. Serial Violation

Plaintiff contends that a number of events which took place prior to April 30, 1996, relate to events that fall within the statute of limitation period and can be asserted as a serial hostile environment sexual harassment claim. Defendant responds that the Court should reject the continuing violation assertion because Plaintiff alleges a series of different events at different times involving different people.

Having found that the Leonti meeting occurred within the limitation period, the Court turns to the question of whether a substantial relationship exists between this timely claim and the series of acts alleged to create a hostile work environment that antedate the limitations period. In determining whether a substantial relationship exists, the Court will consider three factors: whether the untimely claims involve the same subject matter as the timely act, whether the untimely acts are frequent or isolated occurrences, and the degree of permanence. *See Sabree*, 921 F.2d at 402 and n.12 (citing *Berry v. Board of Supervisors of LSU*, 715 F.2d 971, 981 (5th Cir. 1983)).

The Court understands Berry to make the following hostile work environment allegations: Ryan's alleged statements that "he could make things much better for [her] at the Postal Service if only [she] would submit to his requests" and that "he would negotiate with [her] if [she] gave him something he wanted," his "asking [her] out on his boat [and to go have] beers with him," and his statement that "he could make [her] feel better," Berry EEO Aff. ¶ 4; Ryan's stories to her about his "female conquests with other women," Berry EEO Aff. ¶ 4; Ryan's "derogatory comments such as, 'You bitches always want things done your way,'" Berry EEO Aff. ¶ 4; the permeation of her work environment with sexual comments, sexually abusive statements, sex-related jokes, and sexually explicit cartoons,[8] Berry EEO Aff. ¶¶ 3, 5; Berry Dep. at 122, 276-78, Ex. 21; repeatedly

[8] By way of example, Plaintiff states that she once saw "a replica of a penis on [Ryan's] desk," Berry EEO Aff. ¶ 4; Berry Dep.

being called "a bitch and a cunt," Berry EEO Aff. ¶ 3; male employees' use of the bathroom while Plaintiff was cleaning it in 1992, and the presence of sexually explicit graffiti throughout the men's bathroom, Berry EEO Aff. ¶ 8; and Hefty's false statements to co-worker portraying Plaintiff as having a sexual relationship with co-worker Chuck Simmons,[9] Berry EEO Aff. ¶ 10. Defendant does not dispute that the subject matter of Berry's sexual harassment anchor claim – the Leonti meeting – concerned Ryan's conduct towards Plaintiff. Thus, there is facial connection between the timely claim of sexual harassment and the allegations of sexual harassment that took place before April 30, 1996.[10]

The most significant consideration, referred to as the "degree of permanence," queries whether the individual was or should have been aware that the acts were discriminatory. This aspect reflects the rationale that "[a] knowing plaintiff has an obligation to file promptly or lose his claim. This can be distinguished from a plaintiff who is unable to appreciate that he is being discriminated against until he has lived through a series of acts and is thereby able to perceive the overall discriminatory pattern." *Sabree*, 921 F.2d at 402. A "continuing violation claim will fail if the Plaintiff was or should have been aware that [s]he was being unlawfully discriminated against while the earlier acts, now untimely, were taking place." *Provencher*, 145 F.3d at 14. In

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at 127, and a pair of boxer shorts on the wall in his office, Berry EEO Aff. ¶ 4; Berry Dep. at 133.

[9] Plaintiff alleges that "Hefty tried to ruin my credibility by making statements to Mr. Clough that I was having a sexual relationship with a co-worker, Chuck Simmons, which was a complete fabrication." DSUF ¶ 240; PSUF ¶ 240; Berry EEO Aff. ¶ 10. Berry asserts, however, that since 1992, there have been no more instances having to do with the alleged relationship she had with Simmons. DSUF ¶ 243; PSUF ¶ 243. Plaintiff never raised this issue in a timely EEO complaint.

[10] Defendant claims that Berry's allegations of ongoing discrimination are too vague to be cognizable. For support, Defendant relies on *Taylor v. Virginia Union University*, 193 F.3d 219, 234 (4th Cir. 1999), where the court found that the plaintiff's testimony "indicating that unidentified male officers were engaged in sexual relationships with unidentified female students . . . and Corporal Harrell's testimony that unidentified male officers were not disciplined for having undescribed 'contact' with students" was too vague for a reasonable jury to find Taylor established a prima facie case of discrimination. Unlike *Taylor*, Berry has alleged specific incidents of sexual harassment by Ryan and ongoing sexually harassing conduct in the workplace. The Court does not find that Berry's description of specific incidents of Ryan's conduct is too vague to be the basis of a proper claim of discrimination.

Sabree, the First Circuit rejected the plaintiff's continuing violation claim because he "admitted that he believed, at every turn, that he was being discriminated against [because of his race]." *Sabree*, 921 F.2d at 402.

To assess the point at which a plaintiff may be deemed on notice that she is a victim of discrimination, the Court must determine when a reasonable person would have been aware of her right and duty to assert her legal claim. *Galloway v. General Motors Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1996). In considering this inquiry, the Court acknowledges that the beginning and end of a pattern of sexual harassment in the workplace is not always readily apparent. A plaintiff who sues too soon risks having filed suit before the conduct can be deemed sufficiently pervasive, while a plaintiff who waits risks having those early incidents deemed untimely. *Id.* at 1166-67. Courts recognize that the continuing violation doctrine is applicable if the plaintiff can tell only by hindsight that earlier acts represented the early stages of harassment. One court has observed that the early stages of sexual harassment "may not be diagnosable as sex discrimination, or may not cross the threshold that separates the nonactionable from the actionable." *Id.* at 1166 (citing *Baskerville v. Culligan International Co*., 50 F.3d 428, 431 (7th Cir.1995)). Accordingly, one court has recognized that a hostile environment sexual harassment claim is unique, and the failure to file within the applicable time period is not necessarily fatal to a plaintiff's cause of action. The Court explained that "[a]cts of harassment that create an offensive or hostile environment generally do not have the same degree of permanence as, for example, the loss of a promotion." *Waltman v. International Paper Co.*, 875 F.2d 468, 476 (5th Cir. 1989).

Although the number of and apparent frequency of the untimely hostile work environment allegations in this case weigh in favor of finding that Berry should have known, the varied nature

of the allegations and multiple persons involved satisfies the Court that the allegations did not create a degree of permanence that would have required Plaintiff to assert the hostile work environment sexual harassment claim before she did. The Court notes that three of Berry's previously filed EEO complaints included allegations of gender discrimination. On this record, it does not appear that any of those claims involved allegations that could be considered hostile work environment sexual harassment. Rather, the essence of those gender discrimination claims was that Berry was being treated unfavorably because she was a woman.[11] That type of claim being distinct from the hostile work environment claim Berry now asserts, it does not now preclude the finding of a continuing violation. The Court, therefore, finds that Plaintiff's allegations of sexual harassment occurring before April 30, 1996, are actionable as part of a continuing violation. The Court will deny Defendant's Motion for Summary Judgment on Berry's hostile work environment sexual harassment.

b. Systemic Violation

Plaintiff alleges that the Postal Service discriminated against her due in part to a systemic bias against any employee who participated in the EEO process. Specifically, Plaintiff asserts that a number of the retaliatory incidents were ongoing and systemic and, therefore, that they survive as a result of the continuing violation exception to the limitations period.[12] Defendant responds that

[11] The Court does not have the benefit of the actual EEO documents from EEO cases 1141-92 and 1214-92, which allege gender discrimination. Thus, the Court relies on the description of those claims in Defendant's Statement of Undisputed Facts. With respect to EEO case 1014-95, the August 4, 1997, final agency decision states "In your complaint, you alleged discrimination based on your sex and in retaliation for your prior EEO activity in that you were subjected to harassment and degradation by management for the period November 8 through December 27, 1994, when: (1) you were mandated to attend BBC training; (2) your request to update the tool and parts clerk job was denied; (3) you were hollered at in the presence of co-workers; (4) you were harassed regarding your union activity; and (5) you were denied overtime opportunities." None of the three claims of gender discrimination allege claims of the type now asserted as hostile work environment sexual harassment.

[12] It does not appear from Berry's opposition to Defendant's Motion for Summary Judgment that Plaintiff has asserted discrimination because she is a woman. If she does make this assertion, however, the Court finds that she cannot establish a continuing violation for the same reasons as the Court finds there is no continuing violation of retaliation.

Plaintiff's filing of a series of EEO claims regarding the same events that she now alleges indicate her awareness of the alleged discrimination.

A systemic violation refers to discrimination found in the "general practices or policies [of the employer], such as hiring, promotion, training and compensation." *Provencher*, 145 F.3d at 14 (citations omitted). The theory of systemic violation does not require Plaintiff to identify a discrete act of discrimination occurring within the limitations period if the policy or practice continues into the limitations period. As with the serial violation theory, Plaintiff cannot utilize this theory if she "was or should have been aware that [s]he was being unlawfully discriminated against while the earlier acts, now untimely, were taking place." *Id.* at 14 (citing *Sabree*, 921 F.2d at 402). Although Plaintiff nowhere admits that she knew the discriminatory nature of any prelimitation period acts, it seems clear from the record that she did know. The long history of Plaintiff's EEO retaliation complaints make manifest that she believed all along that management at the Postal Service engaged in discrimination against her for filing EEO claims on her own behalf as well as for filing, in her role as a union representative, EEO claims on behalf of others. Indeed, the fact that Plaintiff filed six EEO complaints alleging retaliation by her supervisors at the Postal Service for filing EEO complaints on her own behalf, as well as one EEO claim, in December 1994, alleging retaliation based on her union activities on behalf of others,[13] shows that she knew of the alleged wrongful acts of Defendant prior to April 30, 1996. By initiating and pursuing the appropriate administrative procedures, Berry obviously believed that she was experiencing retaliation. After receiving a final administrative decision in those previously filed EEO cases, Berry had to file in federal court in order to timely pursue those claims of retaliation.

[13] Plaintiff alleges that Ryan told her a number of times between 1993 and 1996 that if she did not stop complaining, he would make her life miserable. Berry Dep. at 27-33. During this time, Plaintiff filed no less than six EEO complaints alleging retaliation relating to her filing EEO complaints. In addition, EEO case 1014-95 alleged that she experienced retaliation because of her union activities.

She cannot now get around the filing requirements of a Title VII suit in federal court by asserting a continuing violation. *See Scott v. St. Paul Postal Service*, 720 F.2d 524, 525 (8th Cir. 1984) (per curiam) ("A claim of continuing discrimination does not in any way affect the complainant's obligation to file an action in district court within thirty days of receipt of the agency's final decision disposing of his complaint.") Nor can Berry use the continuing violation theory as a means to revive claims she has already settled. *See Tang v. Rhode Island*, 904 F. Supp. 69, 75-76 (D.R.I. 1995).

As to the previously unalleged incidents which occurred before April 30, 1996, the Court finds that Berry should have known of their retaliatory nature. The evidence relied upon by the Court in support of its conclusion that Berry knew also convinces the Court that she should have been aware of their retaliatory nature. As an aware employee who had filed numerous EEO complaints over the course of her employment in the maintenance department, Plaintiff, at the very least, should have known that she was being retaliated against. Thus, finding that Berry either knew or should have known of the retaliatory nature of all of the pre-April 30, 1996 incidents, requires the Court conclude that Plaintiff has failed to establish the existence of a claim of continuing retaliation under the systemic violation theory.

B. Independent Viability of Plaintiff's Retaliation Claims

Having determined that Plaintiff's allegations of retaliation do not make out a continuing violation, the Court now considers the independent viability of Berry's various claims of retaliation. Here again, Defendant contends that Berry should not be permitted to raise at trial those claims that occurred prior to the forty-five-day EEO window because they are untimely. The retaliation claims fall into three classes: ongoing acts of retaliation, allegations of retaliation not

included in previously filed EEO cases, and allegations of retaliation included in previously filed EEO cases.

1. Ongoing Acts of Retaliation

Plaintiff maintains that the following acts are not untimely because the ongoing conduct extended into the statute of limitation period. The Court's determination of no continuing violation of retaliation then requires Plaintiff to show that the event occurred after April 30, 1996, to be actionable.

First, Berry alleges that Ryan continually threatened to make her job miserable by breaching the collective bargaining agreement if she filed EEO complaints and that he followed through with those threats. Berry EEO Aff. ¶ 20. Ryan does not deny Berry's allegations. Plaintiff, however, has not asserted any specific facts with respect to being threatened by Ryan after April 30, 1996. Plaintiff having failed to raise a genuine dispute of fact within the limitation period regarding this allegation, the Court will grant Defendant's Motion for Summary Judgment on this aspect of the retaliation claim.

Plaintiff also contends that she was continually denied promotions at the Postal Service. Defendant asserts that Plaintiff neither applied nor was eligible for any promotions within the maintenance department from January 1996 until June 1996, when she stopped working at the Postal Service. DSUF ¶ 251; Olbrias Aff. ¶ 4; Manganaro Aff. ¶ 15. Thus, Defendant asserts, Plaintiff was not denied any promotional opportunities during the forty-five-day period preceding June 14, 1996. DSUF ¶ 252; Olbrias Aff. ¶ 4; Manganaro Aff. ¶ 15. Plaintiff does not dispute that she did not apply for any promotions during her final months at the Postal Service. Rather, Plaintiff counters that Ryan manipulated the job requirements in such a way as to render her

perennially ineligible to apply for promotions. PSUF ¶ 251; Berry Dep. at 85-87. Plaintiff has not asserted any specific facts with respect to the change of the requirements for any positions within the maintenance department after April 30, 1996. Plaintiff having failed to raise a genuine dispute of fact within the limitation period regarding this allegation, the Court will also grant Defendant's Motion for Summary Judgment on this aspect of the retaliation claim.

2. Specific Instances of Retaliation Not Previously Asserted

Plaintiff's EEO allegations in this case include a number of acts that occurred over the course of the five years she worked in the maintenance department but prior to April 30, 1996, and as to which she did not file complaints with the EEO. Those allegations relating to Berry's retaliation claim which are untimely include: the towing of her car[14]; the refusal of management to accept Berry's 991 form for promotion to the position of tool and parts clerk[15]; Hefty's comment to the effect that those employees who made EEO complaints would not be promoted[16]; Robert Swift's false statements to Berry's co-workers that she was filing sexual harassment charges against them[17]; the refusal of Marc Scheele, an EEO counselor, to accept Berry's presentation of

[14] Plaintiff alleges in her affidavit filed in support of her EEO case 1012-96 that her car was towed by Dave Hubner in retaliation for Plaintiff representing Sharon Strout in an EEO claim against Hubner. Berry Aff. ¶ 20. Berry filed a union grievance with respect to her car being towed, which was resolved in November of 1995. DSUF ¶ 195; PSUF ¶ 195; Berry Dep. at 65; Nelson Declaration ¶¶ 5-8. This incident occurred in 1995.

[15] Plaintiff alleges that Darlene Brooks, a Human Resource Specialist, retaliated against her by refusing her 991 form for the promotion to tool and parts clerk in 1995. DSUF ¶¶ 141, 147; PSUF ¶¶ 147, 141. This incident occurred in 1995.

[16] Plaintiff alleges that her onetime boss, Phil Hefty, "told employees that anybody who filed an EEO complaint would not get anywhere in his department." Berry EEO Aff. ¶ 9. Plaintiff did not hear Hefty make this statement, but, rather, she understood that he had made that comment at a hearing before Administrative Law Judge Cuevas in July of 1994. DSUF ¶ 225; PSUF ¶ 225; Berry Dep. at 159; Scheele Aff. ¶ 44. This incident occurred in or before 1994.

[17] Plaintiff alleges that during 1991 and 1992, Robert Swift falsely told Berry's co-workers that she was filing sexual harassment charges against them. DSUF ¶ 230; PSUF ¶ 230; Berry EEO Aff. ¶ 9; Berry Dep. at 160. Berry has had no problems like this since 1992. DSUF ¶ 231; PSUF ¶ 231; Berry Dep. at 160. This incident occurred in the years 1991 and 1992.

handwritten notes detailing incidents which she felt were discriminatory or harassing[18]; and finally, the change of days off from Saturday/Sunday to Tuesday/Wednesday when Berry received her scores and entitled to a promotion in 1992[19]. There being no dispute that these events occurred before April 30, 1996, and no continuing retaliation having been found, the Court will grant Defendant's Motion for Summary Judgment on these retaliation allegations.

3. Specific Instances of Retaliation Previously Asserted

Plaintiff's EEO allegations in this case also include a number of acts that occurred over the course of the five years she worked in the maintenance department but prior to April 30, 1996, and as to which she did file complaints with the EEO. As an aware employee, who had timely filed complaints with an EEO counselor, she had to follow through on those complaints or lose them. The previously filed claims, which were part of past EEO complaints by Berry and which were either settled or withdrawn and not pursued to federal court within 90 days, include the following incidents: management's delay of the completion of her PER for approximately one year, from April 11, 1991, to April 14, 1992[20]; management's decision not to award higher-level details during the time her PER was delayed[21]; temporary maintenance supervisor Swift's refusal to allow

[18] Plaintiff contends that in March of 1992, she brought handwritten notes detailing incidents that Plaintiff felt were discriminatory or harassing to Marc Scheele, an EEO counselor, and he would not accept them. DSUF ¶ 245; PSUF ¶ 245; Berry EEO Aff. ¶ 10; Berry Dep. at 163-64. There is a dispute as to why the papers were not accepted. DSUF ¶¶ 249-50; PSUF ¶¶ 249-50. The factual dispute here is not material because Plaintiff did not file an EEO complaint in a timely manner with respect to this issue.

[19] Plaintiff contends that when she "finally received [her] scores and was due a promotion the available jobs were changed from Sat[urday]/Sun[day] days off to Tues[day]/Wed[nesday] days off." Berry EEO Aff. ¶ 12. The change was made, Plaintiff asserts, by Hefty in retaliation for her filing an EEO complaint against him. PSUF ¶ 256; Berry Dep. at 167. Hefty denies that he ever changed the "hours or tours of any jobs to prevent Ms. Berry from obtaining a promotion." DSUF ¶ 258; Hefty Dec. ¶ 8. The factual dispute here is not material because Plaintiff did not file an EEO complaint in a timely manner with respect to this issue.

[20] Plaintiff also alleges that receipt of her test scores, which she needed to be placed in the appropriate PER, were delayed and that the delay was not corrected for a year in an act of retaliation by Phil Hefty. Berry EEO Aff. ¶ 9; Berry Dep. at 151-52. In EEO case 1141-92, Plaintiff alleged that it was gender discrimination when management of the Postal Service delayed completion of her PER. Scheele Aff. ¶ 4. Plaintiff withdrew this allegation on June 15, 1993, and thereafter failed to pursue this claim to federal court within 90 days. DSUF ¶¶ 28, 29, 219, 220; PSUF ¶¶ 28, 29, 219, 220.

[21] In EEO case 1141-92 Plaintiff alleged that she was bypassed for higher-level painting details during the period of April 1991

women on the softball team in the summer of 1991[22]; the statement by a co-worker to Berry that he had heard from another co-worker of Postmaster Lazaroff's desire to have her fired[23]; the denial by Mr. Paluca and Mr. Hilton on November 30, 1992, of a higher level detail[24]; Hefty's change on June 23, 1992, of the days off for the job Berry was to be awarded[25]; Mullen's harassment of Berry on June 24, 1992[26]; Hefty's denial on September 9, 1992, of Berry's request for Saturdays and

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until March 1992. DSUF ¶ 212; PSUF ¶ 212; Berry Dep. at 152. Plaintiff withdrew this allegation on June 15, 1993, and thereafter failed to pursue this claim to federal court within 90 days. DSUF ¶¶ 28, 29, 219, 220; PSUF ¶¶ 28, 29, 219, 220.

[22] In EEO case 1142-92, Plaintiff alleged that Swift did not allow women on the softball team in the summer of 1991. Plaintiff withdrew this allegation on June 15, 1993, and thereafter failed to pursue this claim to federal court within 90 days. DSUF ¶¶ 28, 29, 219, 220; PSUF ¶¶ 28, 29, 219, 220.

[23] Berry alleges that she was told by several people that Postmaster Lazaroff wanted to fire her. DSUF ¶ 233; Berry EEO Aff. ¶ 10; Berry Dep. at 160. Lazaroff has not been Postmaster since 1993. DSUF ¶ 236. In EEO case 1141-92, Berry raised the issue of having heard that Postmaster Lazaroff wanted her fired. DSUF ¶ 237. Plaintiff withdrew this allegation on June 15, 1993, and thereafter failed to pursue this claim to federal court within 90 days. DSUF ¶¶ 28, 29, 219, 220; PSUF ¶¶ 28, 29, 219, 220.

[24] This allegation is the basis of EEO case 1212-92. In November 1992, the Postal Service issued its final agency decision regarding EEO case 1212-92, rejecting all of the allegations as untimely and for failure to state a claim. DSUF ¶ 36; PSUF ¶ 36. In December 1992, Berry filed a consolidated appeal to the EEOC regarding case 1212-92. In May 1993, the EEOC upheld the Postal Service's final agency decision regarding case 1212-92, on the grounds that the claims were untimely. DSUF ¶ 38; PSUF ¶ 38. In June 1993, Berry requested reconsideration regarding the four cases. DSUF ¶ 39; PSUF ¶ 39. In October 1993, that reconsideration was denied. DSUF ¶ 40; PSUF ¶ 40. Berry did not pursue the allegations from case 1212-92, to federal court within 90 days of the denial of reconsideration. DSUF ¶ 41; PSUF ¶ 41.

[25] This allegation is the basis of EEO case 1213-92. In November 1992, the Postal Service issued its final agency decision regarding EEO case 1213-92, rejecting all of the allegations as untimely and for failure to state a claim. DSUF ¶ 36; PSUF ¶ 36. In December 1992, Berry filed a consolidated appeal to the EEOC regarding case 1213-92. In May 1993, the EEOC upheld the Postal Service's final agency decision regarding case 1213-92, on the grounds that they were untimely. DSUF ¶ 38; PSUF ¶ 38. In June 1993, Berry requested reconsideration regarding the four cases. DSUF ¶ 39; PSUF ¶ 39. In October 1993, that reconsideration was denied. DSUF ¶ 40; PSUF ¶ 40. Berry did not pursue the allegations from case 1213-92 to federal court within 90 days of the denial of reconsideration. DSUF ¶ 41; PSUF ¶ 41.

[26] This allegation is the basis of EEO case 1214-92. In November 1992, the Postal Service issued its final agency decision regarding EEO case 1214-92, rejecting all of the allegations as untimely and for failure to state a claim. DSUF ¶ 36; PSUF ¶ 36. In December 1992, Berry filed a consolidated appeal to the EEOC regarding case 1214-92. In May 1993, the EEOC upheld the Postal Service's final agency decision regarding case 1214-92, on the grounds that they were untimely. DSUF ¶ 38; PSUF ¶ 38. In June 1993, Berry requested reconsideration regarding the four cases. DSUF ¶ 39; PSUF ¶ 39. In October 1993, that reconsideration was denied. DSUF ¶ 40; PSUF ¶ 40. Berry did not pursue the allegations from case 1214-92 to federal court within 90 days of the denial of reconsideration. DSUF ¶ 41; PSUF ¶ 41.

Sundays as her scheduled days off[27]; Berry's being rated lower than she deserved and, as a result, not being selected for position as tool and parts clerk in 1992[28]; management's requirement that she attend BBC training[29]; denial by Olbrias of her request to update her qualifications with respect to the position of tool and parts clerk[30]; and harassment by Giagnorio in the presence of co-workers[31]. There being no dispute that these events occurred before April 30, 1996, and no continuing

[27] This allegation is the basis of EEO case 1268-92. In November 1992, the Postal Service issued its final agency decision regarding EEO case 1268-92, rejecting all of the allegations as untimely and for failure to state a claim. DSUF ¶ 36; PSUF ¶ 36. In December 1992, Berry filed a consolidated appeal to the EEOC regarding case 1268-92. In May 1993, the EEOC upheld the Postal Service's final agency decision regarding case 1268-92 on the grounds that the claims were untimely. DSUF ¶ 38; PSUF ¶ 38. In June 1993, Berry requested reconsideration regarding the four cases. DSUF ¶ 39; PSUF ¶ 39. In October 1993, that reconsideration was denied. DSUF ¶ 40; PSUF ¶ 40. Berry did not pursue the allegations from case 1268-92 to federal court within 90 days of the denial of reconsideration. DSUF ¶ 41; PSUF ¶ 41.

[28] In September 1994, Administrative Law Judge Cuevas ruled that the Postal Service did not discriminate against Berry. DSUF ¶¶ 44-45; PSUF ¶¶ 44-45. Berry appealed the decision of Judge Cuevas, and the appeal was denied in April 1996. DSUF ¶ 46; PSUF ¶ 46. Berry requested reconsideration of the denial of her appeal and that, too, was denied in February 1998. DSUF ¶¶ 47-48; PSUF ¶¶ 47-48. Berry did not pursue the allegations in EEO case 1194-93 to federal court within 90 days of the denial of reconsideration. DSUF ¶ 49; PSUF ¶ 49.

[29] On April 12, 1995, Berry filed a formal complaint with respect to this allegation in EEO case 1014-95. DSUF ¶ 51; PSUF ¶ 51. On April 5, 1996, Berry requested a hearing with respect to EEO case 1014-95. DSUF ¶ 55; PSUF ¶ 55. Later, Berry withdrew her request for a hearing and requested a final agency decision. DSUF ¶ 56; PSUF ¶ 56. In August 1997, the Postal Service issued a final agency decision with respect to EEO case 1014-95, finding no discrimination. DSUF ¶ 57; PSUF ¶ 57. On December 9, 1997, Berry and the Postal Service finalized a settlement agreement to resolve all issues in EEO case 1014-95.[29] DSUF ¶ 58; PSUF ¶ 58.

[30] On April 12, 1995, Berry filed a formal complaint with respect to this allegation in case 1014-95. DSUF ¶ 51; PSUF ¶ 51. On April 5, 1996, Berry requested a hearing with respect to EEO case 1014-95. DSUF ¶ 55; PSUF ¶ 55. Later, Berry withdrew her request for a hearing and requested a final agency decision. DSUF ¶ 56; PSUF ¶ 56. In August 1997, the Postal Service issued a final agency decision with respect to EEO case 1014-95, finding no discrimination. DSUF ¶ 57; PSUF ¶ 57. On December 9, 1997, Berry and the Postal Service finalized a settlement agreement to resolve all issues in EEO case 1014-95.[30] DSUF ¶ 58; PSUF ¶ 58.

[31] Plaintiff alleges that because of her EEO activity, John Giagnorio harassed her. Berry EEO Aff. ¶ 15. Specifically, Plaintiff contends that Giagnorio would follow her around trying to instigate a confrontation with her so that he could write her up for a "Zero Tolerance Violation," that he slammed a door in her face in front of co-workers, that he hung up the phone on her, and that he made obnoxious gestures toward her while she was talking to another employee of the Postal Service. Berry EEO Aff. ¶ 15. On April 12, 1995, Berry filed a formal complaint with respect to this allegation in EEO case 1014-95. DSUF ¶ 51; PSUF ¶ 51. On April 5, 1996, Berry requested a hearing with respect to EEO case 1014-95. DSUF ¶ 55; PSUF ¶ 55. Later, Berry withdrew her request for a hearing and requested a final agency decision. DSUF ¶ 56; PSUF ¶ 56. In August 1997, the Postal Service issued a final agency decision with respect to EEO case 1014-95, finding no discrimination. DSUF ¶ 57; PSUF ¶ 57. On December 9, 1997, Berry and the Postal Service finalized a settlement agreement to resolve all issues in EEO case 1014-95. DSUF ¶ 58; PSUF ¶ 58.

retaliation having been found, the Court will grant Defendant's Motion for Summary Judgment on these retaliation allegations.

C. Hostile Environment Sexual Harassment (Count I)

The elements a plaintiff must prove to succeed on a hostile environment sexual harassment claim are: (1) that she is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter plaintiff's working conditions; and (5) the establishment of some basis for employer liability. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-73, 106 S. Ct. 2399, 91 L. Ed. 2d. 49 (1986); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993); *Wills v. Brown University*, 184 F.3d 20, 25-26 (1st Cir. 1999); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898-901 (1st Cir. 1988). Berry asserts a claim for hostile work environment sexual harassment spanning her entire employment in the maintenance department from April 1991 to June 1996. In its brief, Defendant only addresses the severity of the sexual harassment, arguing that the challenged work environment does not satisfy the legal test to support this type of claim.

To determine whether an environment is sufficiently hostile, the court must look to the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (quoting *Harris*, 510 U.S. at 23, 114 S. Ct. 367, 126 L. Ed. 2d 295). Harassment is actionable only if it is both objectively and subjectively offensive. *See Faragher*, 524 U.S. at 787, 118 S. Ct. 2275, 141 L. Ed. 2d 662. Not every insult or harassing comment will constitute a hostile work environment. Repeated

derogatory or humiliating statements, however, can constitute a hostile work environment. The Court finds that Berry's sexual harassment allegations, viewed in the light most favorable to her, raises a genuine factual issue regarding the severity of her work environment. The Court will then deny Defendant's Motion for Summary Judgment on Berry's Title VII hostile work environment sexual harassment claim.

D. Title VII Retaliation (Count II)

Three elements form the basis of a prima facie case of retaliation: (1) a plaintiff's engagement in conduct protected by Title VII; (2) an adverse employment action; and (3) a causal connection between the protected conduct and the adverse employment action. *See Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir. 1996). The Court's determination that there is no continuing violation retaliation claim leaves as the foundation of Berry's retaliation claim the Leonti meeting and the AWOL incident.

1. Union Activities

Defendant first asserts that the part of Plaintiff's retaliation claim founded on her union activities cannot form the basis of a retaliation claim under Title VII because this type of claim is preempted by the National Labor Relations Act ("NLRA"). Plaintiff counters that the retaliation she endured for filing union grievances and EEO claims on behalf of her co-workers alleging discriminatory employment practices by the Postal Service is actionable under Title VII.

In *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990), the Court of Appeals for the First Circuit rejected a black plaintiff's attempt to bring a retaliation claim under section 704 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), based on his union organizing activities which were alleged to include general opposition to discriminatory treatment. In rejecting Morgan's retaliation claims, the First Circuit stated that a violation of Title VII would be

alleged "if an employee has engaged in expression against employer policies, even within the context of union activities, which violate the Civil Rights Act, such as discriminatory treatment of minorities or sexual harassment, and the employee alleges discharge for the expression." *Morgan*, 901 F.2d at 194. *Morgan* is distinguishable in that the plaintiff there never asserted that there was discriminatory treatment by the hospital, whereas here, it is alleged that Defendant retaliated against Berry because she asserted, through the EEO process, that Defendant was discriminating against certain APWU members based upon race, gender, and disability. PSAF ¶ 5. Berry's claim is not one that is based on an unfair labor practice. Therefore, this aspect of her retaliation claim is not preempted by the NLRA.

2. Adverse Employment Action – Constructive Discharge

In order to establish a *prima facie* case of retaliation under Title VII, Berry must establish that she engaged in protected activity and suffered an adverse employment action as a result of the protected activity. Defendant does not dispute that Plaintiff engaged in protected activity, but, rather, he argues that she suffered no adverse employment action as a result of her protected conduct. Plaintiff responds that the Postal Service constructively discharged her because she filed EEO complaints alleging discrimination both on behalf of herself and her union co-workers and that the constructive discharge was a result of the discriminatory treatment.

A "discharge" under § 2000e-3(a) may be either direct or constructive. *See Hernandez-Torres v. Intercontinental Trading, Inc*., 158 F.3d 43, 47-48 (1st Cir. 1998). The Court of Appeals for the First Circuit has stated that "constructive discharge presents a 'special wrinkle' that amounts to an additional prima facie element." *Landrau-Romero v. Banco Popular De Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000) (quoting *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 719 (1st Cir.1994)). While there is no exact test for determining a constructive discharge, a

plaintiff must prove that an employer imposed "'working conditions so intolerable [ ] that a reasonable person would feel compelled to forsake his job rather than to submit to looming indignities.'" *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 46 (1st Cir. 1999) (quoting *Vega v. Kodak Caribbean*, Ltd., 3 F.3d 476, 480 (1st Cir. 1993)) (alteration in original). On this record, the determination of Berry's claim of constructive discharge presents a genuine issue of material fact for the jury. Therefore, summary judgment is not appropriate.

3. Causal Connection Between Constructive Discharge and Leonti Meeting and/or AWOL Incident

Defendant asserts that the events which occurred in the weeks leading up to Berry's decision to leave do not amount to constructive discharge and that Plaintiff has set forth no evidence that the untimely events of alleged retaliation which took place over the five years of Plaintiff's employment had any bearing on Plaintiff's decision to leave the Postal Service in June 1996. Plaintiff disagrees.

Defendant's argument challenging the relevance of the untimely incidents of alleged retaliation to Berry's claim of constructive discharge is not appropriate for the Court to address on summary judgment.[32] With respect to the timely acts of retaliation, one way in which a plaintiff may demonstrate a causal connection between protected conduct and constructive discharge is through the timing of the discharge. Evidence that an employee resigned soon after a retaliatory event may support a conclusion of constructive discharge. *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 168 (1st Cir. 1998); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110 (1st

[32] Although the Court concluded above that many of Berry's retaliation claims are time barred, evidence of those acts may be relevant to support her claim of constructive discharge. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L. Ed. 2d 571 (1977) ("A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered it is merely an unfortunate event in history which has no present legal consequences.").

Cir. 1988); *Nelson v. University of Maine Sys*., 923 F. Supp. 275, 285 (D. Me. 1996). If, however, a plaintiff does not resign within a reasonable time period after the alleged harassment or retaliation, then she was not constructively discharged. *See Smith v. Bath Iron Works Corp*., 943 F.2d 164, 167 (1st Cir. 1991) (no constructive discharge found where plaintiff quit six months after last reported incident of sexual harassment). The Court finds that Plaintiff's resignation, within weeks of her meeting with Leonti and the AWOL incident, raises an issue of fact as to whether it came within a reasonable time to establish constructive discharge. Plaintiff has thus generated a genuine issue of fact on the question of whether there was a causal connection between her departure from the Postal Service and the alleged retaliatory conduct.

The Leonti meeting and the AWOL incident, viewed in the light most favorable to Plaintiff, are sufficient to raise a genuine issues of material fact over whether these encounters constitute retaliation. The Court will therefore deny Defendant's Motion for Summary Judgment on Berry's Title VII retaliation claim.

E. Americans with Disabilities Act Retaliation (Count III)

Defendant contends that the Americans with Disabilities Act, 42 U.S.C. § 12102 *et seq*., does not apply to the Postal Service and, therefore, should be dismissed. Plaintiff does not respond to Defendant's argument. Because the definition of "employer" in § 12111(5)(B) of the ADA excludes "the United States [or] a corporation wholly owned by the government of the United States," the Court agrees with the Postal Service that the ADA does not apply to it.[33] The Court will then grant Defendant's Motion for Summary Judgment on Berry's Americans with Disabilities Act claim.

III. CONCLUSION

[33] Berry does not dispute that the Postal Service is a corporation wholly owned by the United States.

Accordingly, it is **ORDERED** that Defendant's Motion for Summary Judgment be, and it is hereby, **GRANTED** on Count III and **DENIED** on Counts I, II, and IV. At trial, Plaintiff may pursue her claims of continuing hostile work environment sexual harassment (Count I), retaliation based on the Leonti meeting and the AWOL incident (Count II), and rehabilitation act violation (Count IV).

_____
GENE CARTER
District Judge

Dated at Portland, Maine this 26th day of October, 2000.

STEPHANIE BERRY plaintiff	JOSEPH J. HAHN 774-1200 [COR LD NTC] BERNSTEIN, SHUR, SAWYER, & NELSON 100 MIDDLE STREET P.O. BOX 9729 PORTLAND, ME 04104-5029 207-774-1200
v.	
UNITED STATES POSTMASTER GENERAL defendant	EVAN ROTH, ESQ. [COR LD NTC] OFFICE OF THE U.S. ATTORNEY P.O. BOX 9718 PORTLAND, ME 04104-5018 (207) 780-3257